Supreme Court, U.S.
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No. 00-0776

In The

Supreme Court of the United States

MORGAN STANLEY DEAN WITTER & CO.,

Petitioner,

v.

JAMES ROSKIND,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

Petitioner ("Morgan Stanley") presses its suit here after further review was rejected in both the California Court of Appeal and the California Supreme Court. The writ of certiorari to this Court should be denied on several grounds. First, the case is not justiciable in this posture. The California Court of Appeal's decision merely overruled Defendant/Petitioner's demurrer to Plaintiff's complaint. The judgment below is, therefore, not a final judgment nor are any exceptions to the final judgment rule available to Petitioner. Further, the case is simply not ripe for review on this factual record since Defendant's substantive claims depend upon a showing that state law is in actual conflict with federal law, a showing that cannot be made by resort to hypothetical possibilities. A full factual record is necessary to see if a conflict is at issue. Further, Petitioner does not meet the requirements of 28 U.S.C. § 1257 or Supreme Court Rule 10; cases it cites for conflict among courts of other states or this Court are clearly distinguishable and do not present a conflict with the lower court's decision.

The writ should similarly be denied because it does not raise a substantial federal question. The decision below was completely consistent with the federal preemption decisions of this Court last term. Here, state remedies are being sought to implement federal standards under the NASD, part of the federal scheme for securities regulation. Implied preemption, where state law stands as an obstacle to the federal scheme, cannot be shown. Here, in addition, Congress has specifically indicated in the Savings Clause to the Exchange Act that the

securities industry is subject to joint regulation by state and federal authorities.

Finally, Petitioner stretches to hypothesize an inconsistency between state and federal law as to the intricacies of "best execution" and "trading ahead," the practices at issue here. These claims go to the type of relief the lower court may grant under state law. All of these arguments are properly made in the context of fashioning a remedy in the lower court, should Plaintiff prevail there, and ought not be raised for speculative decision in this Court.

I. The Case is Not Justiciable

A. The Judgment Below is Not a Final Judgment

First and foremost, Morgan Stanley's petition is not justiciable at this time; it does not seek review from a final judgment of the highest court of a state. Petitioner has brought the case here after the California Court of Appeal overruled its demurrer in the trial court. Petitioner previously sought reconsideration in the state Court of Appeal, which was denied, and brought a petition for review in the California Supreme Court, which was rejected. This case has been returned to the trial Court for pre-trial and trial proceedings.

This Court reaffirmed the importance of the final judgment rule in *Jefferson v. Tarrant*, 522 U.S. 75 (1997). There, in dismissing the writ on an interlocutory certified question, the Court discussed the substantive requirements of 28 U.S.C. § 1257(a). It said:

> a state court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein. It must be the final word of a final court." [citations omitted] *Id.* at 81.

Here, the clear standards of finality are not met. The case below is at the most preliminary stage. All that has occurred to date was an early ruling on Defendant's demurrer regarding the application of California's unfair business practices act to Defendant's conduct as Plaintiff's broker in the context of a sale of securities. The ruling below found Plaintiff's use of the state remedy not preempted by federal law. Plaintiff now stands ready to begin to prosecute his case in the trial court.

The case is at an early procedural stage. Discovery has not commenced; no trial date has been set. At this point, there is simply not an "effective determination of the litigation." *O'Dell v. Espinoza*, 456 U.S. 430 (1982). For example, the federal question may be mooted if the Defendant prevails below and, if not, an appeal can be had on a more complete record of factual findings. The purpose of the final judgment rule is to promote efficiency and judicial restraint in the context of federalism. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). This Court should not intervene unless the record is complete. Plaintiff is entitled to develop his state law claims fully in the appropriate forum: the state court. The procedural posture of the case at bar demonstrates the wisdom of the Court's final judgment rule.

B. No Exception to the Final Judgment Rule Applies Here

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court set forth categories of cases where there might be sufficient finality to the determination of the federal question that an exception to the final judgment rule might be warranted. None of those categories are implicated here. This case, for example, does not present an important federal issue which will survive "regardless of the outcome of the state decision." *Id.* at 480. If the Plaintiff fails to prove his case at trial, Defendant will prevail on state law grounds and the issue of federal preemption is mooted. Likewise, it does not present a situation where review of the federal issue cannot be had later on, *Id.* at 481; Defendant can bring his case for review after a final judgment.

The *Cox* exceptions are most powerful, as in *Cox* itself, where there is a federal constitutional defense to a state law claim, which will definitively determine the case if decided in the Defendant's favor. Then, the federal issue is both important, because of the strength of the federal interest, and inevitable, for the issue will remain even after the state claims are determined. In such a situation, the Court has at times found it efficient to review the claim at an early juncture. Here, as discussed next, development of the factual record is necessary for any court to make a determination whether an obstacle is presented to the implementation of a federal scheme. The *Cox* categories do not address this circumstance.

C. On this Factual Record, the Case is Not Ripe

This case is not ripe for review in this Court. As the Court noted in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-9 (1967), the prudential doctrine of ripeness allows the Court to prevent "through avoidance of premature adjudication, from entangling [itself] in abstract disagreements." As the Court explained, the focus of the doctrine of ripeness is on the "fitness of the issues for judicial decision." *Id.*

This case has just been remitted to the trial court; the parties have yet to begin discovery. Even if Defendant were somehow able to persuade this Court that there is a theoretical possibility of implied federal preemption of this state law remedy, the current record is insufficient for any analysis of the issue.

Roskind, the Plaintiff/Respondent, argues that California statutory and common law merely supplies a state remedy for his action against this brokerage house for breach of fiduciary duty and other unfair business practices. Roskind intends that the substantive standards to be applied to Petitioner's conduct are those set forth in the NASD regulations. Petition for Certiorari, App., 17a-24a. Since Petitioner argues that "conflict preemption" is the basis for its application for the writ, it need demonstrate that intervention by the California courts would conflict with federal authority. It simply cannot do so on this bare record (nor, Roskind contends, at all).

In essence, the parties differ on the pragmatic effect of the implementation of the state remedy on the existing federal scheme. Without full factual development in the

courts below, there is no record which would allow the Court to determine if any conflict exists. Without the exact wording of any injunction governing Petitioner's conduct, the impact of the state remedy on federal interests remains illusory. It is only after full development through discovery and trial that a sufficiently formed case or controversy raising federal concerns could be shaped. The case is not ripe for review at this stage.

D. The Statutory Requirements for Review are Not Met Here

On petition from a state court, Supreme Court Rules 10(b) and (c) implement the jurisdictional requirements of 28 U.S.C. § 1257(a) for review by writ of certiorari in this Court. They require a showing that the state court has decided "an important federal question" which "conflicts" with a decision of another state or federal court or with relevant decisions of this Court. Petitioner fails in its attempt to make such a showing here and, therefore, cannot meet the requirements of the statute or rule.

The cases Petitioner cites for the presumptive conflict among state courts, primarily *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31 (1996), *cert. denied* 520 U.S. 1118 (1997), and *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918 (Minn. 1996), *cert. denied* 519 U.S. 866 (1996), found federal preemption of state law in the context of regulation of "order flow payments." Order-flow payments, incentive payments given by wholesale dealers to brokers to entice them to route customer orders through the wholesaler, were *expressly determined by the Securities and Exchange Commission to be an acceptable business practice. See Guice,*

supra at 48. As the California Court of Appeal recognized below, these cases do not impact on the trading practices of Morgan Stanley at issue here. There is no suggestion by Petitioner that federal law **permits, much less endorses,** the practices of "trading ahead" of customers or failing to employ standards of "best execution" of customer's orders. Petitioner, in effect, concedes that the NASD Regulations **prohibit** this very conduct (for which, in fact, Petitioner was sanctioned by the NASD). The Court of Appeal quite properly declined to follow the "order-flow" cases; those decisions do not create a conflict with this one. *See* Appendix at 9a-12a.

II. The Decision Below is Consistent with Recent Supreme Court Precedent on Federal Preemption

A. "Obstacle" Preemption is Not Presented on these Facts

Petitioner argues only implied preemption here: that the case at bar is an example of a situation where the state law stands as an obstacle to the federal regulatory scheme. It cites cases decided by this Court last term which held, in different factual and legal contexts, state law claims preempted. The circumstances of those federal/state conflicts differ markedly from the one here. The cases are easily distinguishable and, therefore, do not substantively conflict with the decision below. This Court should resist Morgan Stanley's attempt to rely upon their holdings.

In *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000), this Court found an actual conflict between a state

tort remedy which imposed liability for failure of a manufacturer to install airbags and the Department of Transportation's Federal Motor Vehicle Safety Standard (FMVSS) 208, which required auto manufacturers to equip their 1987 vehicles with various types of passive restraints. The Court found that allowing the state suit, which mandated liability for failure to install airbags, would pose an obstacle to implementation of the federal scheme which **deliberately** allowed manufacturers a range of choice among passive restraint devices. The Court found that the federal policy carefully balanced a range of federal objectives.

Similarly, in *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000), the Court held that a Massachusetts law barring state entities from buying goods or services from companies doing business with Burma presented an obstacle to a federal scheme. It reasoned that the state law undermined the purpose and effect of three federal provisions regarding the scope of action by Congress, and delegation of authority and discretion to the president, to implement sanctions against Burma. Because the state law provided a blanket prohibition, it prevented the more nuanced federal policy from being effectively put in place. The Court there found the state law created an obstacle to the federal framework.

Here, Respondent only seeks to utilize a state remedy which would **implement, not conflict,** with federal standards. The Court's preemption precedents are in agreement that this function of state courts is part of the plan of federalism. This Court has, for instance, previously endorsed supplemental state law remedies, in areas where federal regulatory standards exist. In *Silkwood v.*

Kerr-McGee Corp., 464 U.S. 238 (1984), the Court allowed state tort law to provide compensatory and punitive damages for radiation injuries to a worker at a nuclear power plant, which was in compliance with federal standards. Similarly, in *Cippolone v. Liggett Group, Inc.*, 565 U.S. 504 (1992), a plurality of the Court preserved state common law remedies for liability stemming from generalized obligations otherwise not in conflict with duties created by an explicit federal statutory scheme. Recently, in *Medtronic v. Lohr*, 518 U.S. 470 (1996), the Court supported the application of state remedies to supplement federal regulation of medical devices in the face of a preemption challenge.

Consistent with these cases, allowing Respondent to bring his state court action does not present an obstacle to implementation of a federal scheme. California courts support use of state remedial schemes "as long as the state law did not interfere with the operation of federal law and it was possible to comply with both the state and federal law." *Washington Mutual Bank FA v. Superior Ct. of Los Angeles*, 75 Cal. App. 4th 773, 785 (2d Dist. 1999) (allowing state private rights of action for violations of federally mandated disclosures).

B. The Savings Clause of the Exchange Act Reflects Appropriate State/Federal Balance

Petitioner tries to argue that state laws can be preempted even in light of the specific Congressional mandate to allow state law claims to co-exist with the federal scheme regulating securities transactions. The Savings Clause of the Exchange Act, 15 U.S.C. § 78bb(a), explicitly

preserves certain state law remedies. While Petitioner is correct that such a savings clause cannot mean that state laws can never be preempted, the converse is certainly not necessarily the case. Simply, there is no such conflict here.

The Court in *Geier, supra,* did not, as Petitioner claims, say anything other than federal preemption was found, despite a savings clause, where there was a direct conflict with the explicit intent of the federal statute. The federal regulation authorized an auto manufacturer to choose among passive restraint systems. Honda did so but then was sued under state law for injuries because it did not install another one of the options, the airbag system. It is logical that, if state law prohibits what federal law permits, there is a conflict which needs to be reconciled by a preemption analysis.

But *Geier* is not applicable here. The state statutory and common law remedies California provides would implement practices prohibited by federal law. Thus, there is not any obstacle presented to the federal scheme of regulation. *See Medtronic, supra* at 495 (federal statute does not prohibit state from fashioning traditional damages remedy for violations of common-law duties parallel to federal requirements); *Washington Mutual, supra.*

III. The Decision Below Rests Squarely on California Law and Should Not Be Reviewed by this Court at this Time

Petitioner's final arguments raise questions about the scope and breadth of a potential remedy available under

state law for violation of the federal standards. Addressing them at this point in time, when no injunction has been formulated or remedy considered by the lower court, is clearly premature. At the pleading stage, Respondent does not seek to impose any additional requirements beyond those in the NASD regulations.

Petitioner complains that implementation of the state remedy might deprive broker-dealers of "important procedural protections" in the existing scheme, Petition at 23, n.3. Respondent is sympathetic: he must use available state law remedies because a private right of action is not provided under the NASD regulatory scheme. Respondent, therefore, has no authorization to initiate an action under the NASD against a broker who violates NASD regulations. Procedural protections should work both ways.

Hypothetical worries about the scope of a remedy should not protect Morgan Stanley's practices from scrutiny by the state judiciary under existing state law schemes. If at all, this Court can review only a final judgment when review is appropriately sought at the end of the case.

CONCLUSION

For the reasons given, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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